



## Proposed Regulation Agency Background Document

<b>Agency name</b>	Board of Dentistry, Department of Health Professions
<b>Virginia Administrative Code (VAC) citation</b>	18VAC60-20-10 et seq.
<b>Regulation title</b>	Regulations Governing the Practice of Dentistry and Dental Hygiene
<b>Action title</b>	Recovery of administrative costs in disciplinary actions
<b>Date this document prepared</b>	12/13/09

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 36 (2006) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

### Brief summary

*In a short paragraph, please summarize all substantive provisions of new regulations or changes to existing regulations that are being proposed in this regulatory action.*

In a new section 18, the board has set out the conditions and procedures for assessment of disciplinary costs relating to investigation and monitoring of a licensee for whom there is a finding that a violation of law or regulation has occurred. The hourly costs for an investigation or for monitoring will be set out annually in a guidance document, and then, costs will be calculated for each case and assessed as a part of an order. Costs for monitoring and investigation could not exceed the statutory limit of \$5,000.

### Acronyms and Definitions

*Please define all acronyms used in the Agency Background Document. Also, please define any technical terms that are used in the document that are not also defined in the "Definition" section of the regulations.*

There are no acronyms used in this document.

**Legal basis**

Please identify the state and/or federal legal authority to promulgate this proposed regulation, including (1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly chapter number(s), if applicable, and (2) promulgating entity, i.e., the agency, board or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.

Regulations are promulgated under the general authority of Chapter 24 of Title 54.1 of the Code of Virginia. Section 54.1-2400, which provides the Board of Dentistry the authority to promulgate regulations to administer the regulatory system:

**§ 54.1-2400 -General powers and duties of health regulatory boards**

*The general powers and duties of health regulatory boards shall be:*

- 1. To establish the qualifications for registration, certification or licensure in accordance with the applicable law which are necessary to ensure competence and integrity to engage in the regulated professions.*
- 2. To examine or cause to be examined applicants for certification or licensure. Unless otherwise required by law, examinations shall be administered in writing or shall be a demonstration of manual skills.*
- 3. To register, certify or license qualified applicants as practitioners of the particular profession or professions regulated by such board.*
- ...*
- 6. To promulgate regulations in accordance with the Administrative Process Act (§ 9-6.14:1 et seq.) which are reasonable and necessary to administer effectively the regulatory system. Such regulations shall not conflict with the purposes and intent of this chapter or of Chapter 1 (§ [54.1-100](#) et seq.) and Chapter 25 (§ [54.1-2500](#) et seq.) of this title. ...*

Specific regulatory authority for the Board of Dentistry is found in Chapter 89 of the 2009 Acts of the Assembly:

**§ [54.1-2708.2](#). Recovery of monitoring costs.**

*The Board may recover from any licensee against whom disciplinary action has been imposed reasonable administrative costs associated with investigating and monitoring such licensee and confirming compliance with any terms and conditions imposed upon the licensee as set forth in the order imposing disciplinary action. Such recovery shall not exceed a total of \$5,000. All administrative costs recovered pursuant to this section shall be paid by the licensee to the Board. Such administrative costs shall be deposited into the account of the Board and shall not constitute a fine or penalty.*

**Purpose**

*Please explain the need for the new or amended regulation by (1) detailing the specific reasons why this regulatory action is essential to protect the health, safety, or welfare of citizens, and (2) discussing the goals of the proposal, the environmental benefits, and the problems the proposal is intended to solve.*

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The purpose of this regulatory action is to initiate rules for recovery of administrative costs relating to the investigation and monitoring of a licensee disciplined by the Board of Dentistry. Legislation passed by the 2009 General Assembly (HB2058) provides statutory authorization for imposition of such costs, and the goal of the amendments is to establish the regulatory framework for which costs may be assessed, how those costs may be determined, the process for assessment of costs.

Enforcement activities constitute the largest expenditure for the board, although only a small percentage of licensees undergo investigation, and an even smaller percentage are found to be in violation of statutes and regulations governing their professions. Therefore, it is equitable to assess at least a portion of enforcement and monitoring costs to those who are the cause of the expenditure. By recovering a portion of its enforcement costs, the board will be better able to meet its obligation to investigate every complaint it receives and to more efficiently and effectively resolve cases related to patient care. The board will have the additional resources necessary to adequately investigate reports of misconduct to make the practice of dentistry and dental hygiene safer for patients in Virginia.

### Substance

*Please briefly identify and explain new substantive provisions (for new regulations), substantive changes to existing sections or both where appropriate. (More detail about all provisions or changes is requested in the "Detail of changes" section.)*

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The statute is specific about some aspects of the authority to recover "reasonable administrative costs associated with investigating and monitoring" a licensee. The recovery of costs will only be implemented if a licensee has had disciplinary action imposed. It will not affect those licensees: 1) who are investigated by the Department, but for whom no probable cause is found to indicate a violation may have occurred; 2) who have a disciplinary proceeding, but for whom no violation is found and no discipline imposed; or 3) who have matters resolved through a confidential consent agreement or an advisory letter.

Rather than setting specific fees or dollar amounts in regulation, the amendments provide a process for determination of both the investigative and monitoring costs, as specified in the Code section. At the end of each fiscal year, regulations require a calculation of the average hourly cost for enforcement that is chargeable to the work of the Board of Dentistry. The Enforcement Division of the Department tracks the number of hours an investigator spends on a case, so that number could be multiplied by the hourly cost to determine the specific costs relating to the investigation of the case against a specific respondent. In addition, the board would assess any costs relating to hiring expert witnesses and the reports generated by such witnesses. While not inclusive of all related administrative costs, a fee based on the actual number of hours and the hourly cost of an investigation would be reasonable and not arbitrary or selectively punitive. The

imposition of the recovery cost would become part of the order from an informal or formal proceeding or part of a consent order agreed to by the parties.

The monitoring costs would be calculated based on the terms and conditions imposed and the length of time the licensee is to be monitored. As with the enforcement costs, the board would annually calculate the average costs of monitoring certain terms, such as the acquisition of continuing education in an area of practice. If the licensee is to be monitored beyond one year, the monitoring cost would be imposed for each of those years. A guidance document would be adopted annually setting out the average investigative and monitoring cost (for the various terms and conditions to be monitored), so the licensees (and their attorneys, if applicable) would have knowledge of the recovery of costs, if disciplinary action is imposed. Since the costs would be incorporated in the order, the respondent would have the option to accept the order, request a formal hearing following an informal, or appeal an order from a formal hearing to a circuit court. As specified in statute, the total of the recovery of costs could not exceed \$5,000. However, the regulations will reference current fees for inspection of dental offices and returned checks as fees not subject to the recovery maximum. Additionally, the board may seek to recover the collection costs for delinquent fines and fees.

### Issues

*Please identify the issues associated with the proposed regulatory action, including:*

- 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions;*
- 2) the primary advantages and disadvantages to the agency or the Commonwealth; and*
- 3) other pertinent matters of interest to the regulated community, government officials, and the public.*

*If the regulatory action poses no disadvantages to the public or the Commonwealth, please so indicate.*

- 1) The primary advantage to the public would be that income generated by the partial recovery of disciplinary costs may allow the board to sustain its investigative, adjudication, and monitoring activities without substantial increases in fees charged to licensees who are not in violation of law and regulation. There are no disadvantages.
- 2) The primary advantage to the agency is the creation of a new source of revenue to offset ever increasing costs relating to the disciplinary functions of the board. There are no disadvantages, but the agency will have an increased responsibility for collection of assessed costs.
- 3) There are no other pertinent matters.

### Requirements more restrictive than federal

*Please identify and describe any requirement of the proposal, which are more restrictive than applicable federal requirements. Include a rationale for the need for the more restrictive requirements. If there are no applicable federal requirements or no requirements that exceed applicable federal requirements, include a statement to that effect.*

There are no applicable federal requirements.

**Localities particularly affected**

*Please identify any locality particularly affected by the proposed regulation. Locality particularly affected means any locality which bears any identified disproportionate material impact which would not be experienced by other localities.*

There are no localities particularly affected.

**Public participation**

*Please include a statement that in addition to any other comments on the proposal, the agency is seeking comments on the costs and benefits of the proposal and the impacts of the regulated community.*

In addition to any other comments, the board/agency is seeking comments on the costs and benefits of the proposal and the potential impacts of this regulatory proposal. Also, the agency/board is seeking information on impacts on small businesses as defined in § 2.2-4007.1 of the Code of Virginia. Information may include 1) projected reporting, recordkeeping and other administrative costs, 2) probable effect of the regulation on affected small businesses, and 3) description of less intrusive or costly alternative methods of achieving the purpose of the regulation.

Anyone wishing to submit written comments may do so via the Regulatory Townhall website, [www.townhall.virginia.gov](http://www.townhall.virginia.gov), or by mail, email or fax to Elaine Yeatts, Agency Regulatory Coordinator, Department of Health Professions, 9960 Mayland Drive, Richmond, VA 23233 or by fax to (804) 527-4434 or to [elaine.yeatts@dhp.virginia.gov](mailto:elaine.yeatts@dhp.virginia.gov). Written comments must include the name and address of the commenter. In order to be considered comments must be received by the last date of the public comment period.

A public hearing will be held and notice of the public hearing may appear on the Virginia Regulatory Town Hall website ([www.townhall.virginia.gov](http://www.townhall.virginia.gov)) and the Commonwealth Calendar. Both oral and written comments may be submitted at that time.

**Economic impact**

*Please identify the anticipated economic impact of the proposed new regulations or amendments to the existing regulation. When describing a particular economic impact, please specify which new requirement or change in requirement creates the anticipated economic impact.*

<p><b>Projected cost to the state to implement and enforce the proposed regulation, including (a) fund source, and (b) a delineation of one-time versus on-going expenditures.</b></p>	<p>a) As a special fund agency, the Board must generate sufficient revenue to cover its expenditures from non-general funds, specifically the renewal and</p>
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	<p>application fees it charges to practitioners for necessary functions of regulation; b) The agency will incur some one-time costs (less than \$1,000) for mailings to the Public Participation Guidelines mailing lists and conducting a public hearing. Every effort will be made to incorporate those into anticipated mailings and meetings already scheduled. On-going expenditures would be administrative costs for collection of such a fee and for possible action against a licensee who is delinquent or non-compliant, so the net income to the board is presently unknown.</p>
<p><b>Projected cost of the <i>new regulations or changes to existing regulations</i> on localities.</b></p>	<p>There are no costs on localities.</p>
<p><b>Description of the individuals, businesses or other entities likely to be affected by the <i>new regulations or changes to existing regulations</i>.</b></p>	<p>The individuals affected by the proposed amendments are those who have been found in violation and have had disciplinary action imposed.</p>
<p><b>Agency’s best estimate of the number of such entities that will be affected. Please include an estimate of the number of small businesses affected.</b> Small business means a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.</p>	<p>There have been approximately 70 disciplinary actions on licensees of the Board of Dentistry per year for the past five years (76 in 2008). It is estimated that most of those would be small businesses with the exception of any dental hygienists who are employed by dentists and not be operating a small business.</p>
<p><b>All projected costs of the <i>new regulations or changes to existing regulations</i> for affected individuals, businesses, or other entities. Please be specific and do include all costs. Be sure to include the projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses. Specify any costs related to the development of real estate for commercial or residential purposes that are a consequence of the proposed regulatory changes or new regulations.</b></p>	<p>Projected costs for the new regulation would be related to costs for the investigation of a licensee and, if applicable, the costs for monitoring compliance with terms and conditions – total costs for investigation and monitoring could not exceed \$5,000.</p>
<p><b>Beneficial impact the regulation is designed to produce.</b></p>	<p>The amendment should result in a modest increase in revenue for the Board of Dentistry. If revenue is sufficient, this action might result in a reduction in the amount of future fee increases for dentists and dental hygienists. Other boards at the Department are watching this regulatory action and its implementation to determine whether similar authorization is advisable.</p>

**Alternatives**

*Please describe any viable alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action.*

*Also, include discussion of less intrusive or less costly alternatives for small businesses, as defined in §2.2-4007.1 of the Code of Virginia, of achieving the purpose of the regulation.*

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The only viable alternative for the Board of Dentistry is to continually increase application and renewal fees for all licensees to cover rising administrative costs for discipline and enforcement. The board has already been notified that a significant deficit in the next biennia is projected and documented, and it will need to consider appropriate regulatory action as mandated by law. While the recovery of some of those costs from the licensees who generate the need for investigation and disciplinary action will not replace future need for increased fees, it may help to mitigate against large fee increases for all licensees in the future.

The statutory authority for recovery of disciplinary costs is already held by the boards at the Department of Professional and Occupational Regulation and the Board of Accountancy. Additionally, there are other states in which the regulatory board has similar authority, so those states' statutes and regulations will be reviewed. In the state of **Washington**, recent legislation authorizes the board to seek reasonable reimbursement of an amount equal to \$6,000 for each full hearing day in the proceeding and one-half of that amount for any partial hearing day; and a partial recovery of investigative and hearing preparation expenses in an amount as found to be reasonable reimbursement under the circumstances but no more than \$10,000. If the licensee seeks judicial review of the disciplinary action and does not receive a "substantial element of relief," the law requires that the trial or appellate court shall impose \$25,000 at each level of judicial review. Such authorization for recovery of costs for proceedings and hearings is not included in the Virginia statute.

Neighboring states that authorize recovery of costs for discipline include **Tennessee**, where the respondent is assessed actual and reasonable costs of the investigation *and* prosecution of the case. In that state, the amount of the costs is not put in the order, but the board's attorneys send an Affidavit of Costs to the respondent following the proceeding. **Kentucky** does recover cost through settlement agreement language (e.g., Recently, the board charged \$500 administrative cost to all the hygienists who failed the continuing education audit.). In **West Virginia**, the board may assess administrative costs which are placed in the special account of the board.

Other states that have similar laws and regulations include: Iowa, New Jersey, Minnesota, Louisiana and Nevada.

In Washington State, there is provision for granting a waiver of all or part of the costs if imposition (i) would create substantial undue hardship for the dentist; (ii) in all the circumstances of the case, including the nature of the charges alleged, it would be manifestly unjust to assess the fee; or (iii) or if the collection of such fees does not appear to be feasible." Other states do not have waiver provisions set out in regulation. The Regulatory/Legislative Committee considered a regulation that would establish a limited number of reasons for which all or part of the costs may be waived and did not recommend the adoption of such language. The board also discussed the advisability of a waiver provision but concluded that it would be too difficult to administer accurately, fairly and equitably.

**Regulatory flexibility analysis**

*Please describe the agency’s analysis of alternative regulatory methods, consistent with health, safety, environmental, and economic welfare, that will accomplish the objectives of applicable law while minimizing the adverse impact on small business. Alternative regulatory methods include, at a minimum: 1) the establishment of less stringent compliance or reporting requirements; 2) the establishment of less stringent schedules or deadlines for compliance or reporting requirements; 3) the consolidation or simplification of compliance or reporting requirements; 4) the establishment of performance standards for small businesses to replace design or operational standards required in the proposed regulation; and 5) the exemption of small businesses from all or any part of the requirements contained in the proposed regulation.*

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There are no alternative regulatory methods to accomplish the intent of the statutory language.

**Public comment**

*Please summarize all comments received during public comment period following the publication of the NOIRA, and provide the agency response.*

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The Notice of Intended Regulatory Action was published on October 25, 2009 with comment until November 25, 2009. There were no comments received. The professional associations were supportive of the 2009 legislation authorizing recovery of disciplinary costs.

**Family impact**

*Please assess the impact of the proposed regulatory action on the institution of the family and family stability including to what extent the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one’s spouse, and one’s children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.*

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There is no impact on the family.

**Detail of changes**

*Please detail all changes that are being proposed and the consequences of the proposed changes. If the proposed regulation is a new chapter, describe the intent of the language and the expected impact if implemented in each section. Please detail the difference between the requirements of the new provisions and the current practice or if applicable, the requirements of other existing regulations in place.*

*If the proposed regulation is intended to replace an emergency regulation, please list separately (1) all provisions of the new regulation or changes to existing regulations between the pre-emergency regulation and the proposed regulation, and (2) only changes made since the publication of the emergency regulation.*

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Proposed new section number, if applicable	Proposed change, rationale, and consequences
18	<p>Subsection A sets out the procedure for assessment of cost for investigation of a disciplinary case.</p> <p>1. In any disciplinary case in which there is a finding of a violation against a licensee or registrant, the board may assess the hourly costs relating to investigation of the case by the Enforcement Division of the Department of Health Professions and, if applicable, the costs for hiring an expert witness and reports generated by such witness.</p> <p><i>Consistent with the law, the costs of an investigation would only be assessed if there is a finding of a violation. Costs would be determined by the number of hours an investigator stipulates he or she has spent on a particular case. Currently, the allocated share for the Board of Dentistry of enforcement costs within the Department is calculated on the usage of enforcement resources – primarily the hours of investigator time dedicated to Dentistry cases. Additionally, the board may incur costs relating to an expert witness (hourly rate plus expenses for preparation of documents from such a witness).</i></p> <p>2. The imposition of recovery costs relating to an investigation shall be included in the order from an informal or formal proceeding or part of a consent order agreed to by the parties. The schedule for payment of investigative costs imposed shall be set forth in the order.</p> <p><i>Since the costs relating to an investigation would be known prior to a proceeding, those costs can be included in the order, along with a schedule for payment of costs. If a respondent disagrees with any part of the order (including the imposition of costs), he or she has the option of appealing the finding of an informal conference to a formal hearing conducted by the board or, if the order came from a formal hearing, the respondent has the option of appealing to a circuit court.</i></p> <p>3. At the end of each fiscal year, the board shall calculate the average hourly cost for enforcement that is chargeable to investigation of complaints filed against its regulants and shall state those costs in a guidance document to be used in imposition of recovery costs. The average hourly cost multiplied times the number of hours spent in investigating the specific case of a respondent shall be used in the imposition of recovery costs.</p> <p><i>By annually issuing a guidance document with hourly costs set out, the imposition of costs will be less arbitrary. The hourly cost will be known in advance, so the board will only have to use the number of hours reported by the investigator to calculate the investigative costs that may be assessed.</i></p> <p>Subsection B sets out the procedure for assessment of cost for monitoring a licensee or registrant.</p> <p>1. In any disciplinary case in which there is a finding of a violation against a licensee or registrant and in which terms and conditions have been imposed, the costs for monitoring of a licensee or registrant may be charged and shall be calculated based on the specific terms and conditions and the length of time the licensee or registrant is to be monitored.</p>

	<p>2. The imposition of recovery costs relating to monitoring for compliance shall be included in the board order from an informal or formal proceeding or part of a consent order agreed to by the parties. The schedule for payment of monitoring costs imposed shall be set forth in the order.</p> <p>3. At the end of each fiscal year, the board shall calculate the average costs for monitoring of certain terms and conditions, such as acquisition of continuing education, and shall set forth those costs in a guidance document to be used in the imposition of recovery costs.</p> <p><i>The methodology for calculation of cost for monitoring is similar to that for investigative cost. Those costs will be established in advance in an annual guidance document and will be calculated on the amount of staff time and other costs relating to monitoring of a respondent under terms and conditions set out in a disciplinary order. The costs will be annualized and multiplied by the amount of time a respondent is to be monitored.</i></p> <p>Subsection C sets out the total of the assessment that may be imposed.</p> <p>In accordance with § 54.1-2708.2 of the Code of Virginia, the total of recovery costs for investigating and monitoring a licensee or registrant shall not exceed \$5,000, but shall not include the fee for inspection of dental offices and returned checks as set forth in 18VAC60-20-30 or collection costs incurred for delinquent fines and fees.</p> <p><i>The Code section authorizing recovery of disciplinary costs sets a limit of \$5,000, so that limit is repeated in regulation. The fees for inspection of dental offices (sometimes required in an order) and for returned checks are already establishes in regulation, so those fees may be additionally imposed as necessary. Likewise, costs relating to collection of such funds may be added in delinquency charges. In the fiscal impact statement on the legislation (HB2058), it was reported that the average cost for enforcement, administrative proceedings and the Office of the Attorney General is \$3,153 per case, so the \$5,000 seems reasonable. The assessment will not include costs for the Attorney General, for scheduling and conducting a proceeding, for administrative proceedings hourly rate for preparation of document, staff time or board member expenses for attendance at hearings.</i></p>
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